VOIR DIRE

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I. PROCEDURE FOR *VOIR DIRE*

Alabama Code Section 12-16-6 provides:

> "It is the duty of the court, before administering the oath prescribed by law to any grand, petit or tales jurors, to ascertain that such juror possesses the qualifications required by law, and the duty required of the court by this section shall be considered imperative."

Ala. Code § 12-16-6 (1986). In furtherance of the trial court's duty under Alabama Code Section 12-16-6, Alabama Rule of Civil Procedure 47 establishes the procedure for conducting voir dire. Ala. R. Civ. P. 47 Committee Comments. Specifically, Alabama Rule of Civil Procedure 47(a) provides that

> "[t]he court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination as may be proper."

Ala. R. Civ. P. 47(a). Although the extent of the voir dire examination is largely within this Court's discretion, "wide latitude should be accorded the parties in their voir dire examination of prospective jurors touching their qualifications, interest or bias." *Welborn v. Snider*, 431 So. 2d 1198, 1201 (Ala. 1983).

Alabama Code Section 12-16-140 establishes the procedure for striking a jury once the questioning is complete:

> "In all civil actions triable by jury, either party may demand a struck jury and must thereupon be furnished by the clerk with a list of 24 jurors in attendance upon the court, from which a jury must be obtained by the parties or their attorneys alternately striking one from the list until 12 are stricken off, the party demanding the jury commencing.
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> "The jury thus obtained must not be challenged for any cause, except bias or interest as to the particular case."

Alabama Code Section 12-16-150 enumerates the grounds for challenging a jury for cause. *See infra* Section III. A.

II. *VOIR DIRE* QUESTIONING

A. Preservation Of Right To A New Trial Because Of Jury

Most importantly, if the parties fail to conduct a thorough examination of prospective jurors, they waive their right to a new trial on grounds that a juror was unqualified. *See Vickers v. Howard*, 281 Ala. 691, 693, 208 So. 2d 72 (1968); *Aaron v. State*, 273 Ala. 337, 139 So. 2d 309, 313-14 (1961), *cert. denied*, 371 U.S. 846 (1962). "The rule is that in failing to use reasonable diligence in testing jurors as to their qualifications or grounds of challenge, there is a waiver of the ground of challenge; and the defendant [or the plaintiff] cannot sit back and invite error because of a juror's qualification." *Aaron*, *supra*. In other words,

> "A party in either a civil or criminal case has the right to examine jurors as to bias, interest, or qualifications; ***but the failure of a party to test prospective jurors, as to matters which might disqualify them, operates as a waiver of the peremptory right to a new trial on that account.***"

Vickers, 281 Ala. at 693 (emphasis added).

The possibility of waiver applies even after *voir dire* is complete. In *Eaton v. Horton*, 565 So. 2d 183 (Ala. 1990), the Alabama Supreme Court held that when a party learns before the close of the trial that a juror failed to respond truthfully on *voir dire*, the party must raise the issue with the trial court <u>before</u> the judgment is rendered. Therefore, during trial, when a party becomes aware of facts that indicate that a juror has failed to respond truthfully on *voir dire*, the party must further investigate the situation if he is truly disturbed by the juror's presence on the jury. In *Holland v. Brandenberg*, 627 So. 2d 867 (Ala. 1993), several days after the jury awarded plaintiff $13,000, defendant discovered that "before the trial, during an in camera interview with a juror, the trial judge was informed by the juror that he had been convicted of

a felony, but that his rights had been restored in 1979." Defendant then appealed arguing that "the trial court committed reversible error by failing to inform the parties of the juror's disqualification." Rejecting defendant's argument, the Court held:

> "Here, on voir dire examination, the prospective jurors were not specifically asked whether any of them had been convicted of an offense involving moral turpitude. Failure to use due diligence in testing jurors as to qualifications or grounds of challenge is an effective waiver of grounds of challenge; a defendant cannot sit back and invite error based on a juror's disqualification. *Beasley v. State*, 337 So. 2d 80 (Ala. Crim. App. 1976). We have examined the record and have determined that the defendant failed to exercise due diligence in ascertaining the qualifications of the juror; he cannot now ask this Court to correct this failure."

Holland, 627 So. 2d at 870.

B. Response to Questions

The Alabama Supreme Court has recognized that "[p]arties have a right to have questions answered truthfully by prospective jurors to enable them to exercise their discretion wisely in exercising their peremptory strikes." *Ex parte O'Leary*, 417 So. 2d 232, 240 (Ala. 1982), *cert denied*, 463 U.S. 1206 (1983). However, a juror's failure to respond properly does not automatically entitle a party to a new trial. *Id.* Instead,

> "The proper inquiry on a motion for new trial based on improper or non-existent responses to *voir dire* questions is whether the response, or the lack of response, resulted in probable prejudice to the movant. *Freeman v. Hall*, 286 Ala. 161, 238 So. 2d 330 (1970). Not every failure of a prospective juror to respond correctly to a *voir dire* question will entitle the losing party to a new trial. *Wallace v. Campbell*, 475 So. 2d 521 (Ala. 1985).
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> "The determination of whether the complaining party was prejudiced by a juror's failure to answer *voir dire* questions is a matter within the discretion of the trial court and will not be reversed unless the court has abused its discretion. *Freeman*, *supra*. Some of the factors that this Court has approved for using to determine whether there was probable prejudice include: 'temporal remoteness

> of the matter inquired about, the ambiguity of the question propounded, the prospective juror's inadvertence or willfulness in falsifying or failing to answer, the failure of the juror to recollect, and the materiality of the matter inquired about.' *Freeman*, 286 Ala. at 167, 238 So. 2d at 336."

Union Mortgage Co. v. Barlow, 595 So. 2d 1335, 1338 (Ala. 1992).

In *Carter v. Henderson*, 598 So. 2d 1350 (Ala. 1992), plaintiffs alleged that the trial court should have granted their motion for a new trial because a juror failed to answer voir dire questions truthfully concerning an alleged association between himself and defendant. Affirming the trial court's refusal to grant a new trial, the Court explained:

> "While we agree with the [plaintiffs] that a juror's silence during voir dire could be a basis for granting a new trial, we must stress that the initial decision on this issue is within the trial court's sound discretion. *Hayes v. Boykin*, 271 Ala. 588, 126 So. 2d 91 (1960). Further, the trial court's decision on this matter will not be disturbed on appeal unless the appellant establishes that the decision was arbitrarily entered into or was clearly erroneous. *Id.* The [plaintiffs] have failed to show that the trial court's decision in this regard was clearly erroneous."

In *Continental Eagle Corp. v. Mokrzycki*, 611 So. 2d 313 (Ala. 1992), one juror failed to respond to the following question: "Any of you know of or have any reason why you should not be selected to serve on this jury?" The juror in question, who worked as a legal secretary for a plaintiff's attorney, failed to reveal that she had been involved in a similar type of case as the one going to trial. The Alabama Supreme Court found that the question was too general to require a response from the juror in question. Finding no evidence of "probable prejudice," the Court affirmed the trial court's denial of a motion for a new trial.

In *Volkswagen of America, Inc. v. Marinelli*, 628 So. 2d 378 (Ala. 1993), a wrongful death products liability action, Volkswagen appealed to the Alabama Supreme Court after the jury returned a verdict in the plaintiffs favor. Volkswagen argued, among other things, that the verdict had to be vacated because several jurors failed to respond to *voir dire* examination

questions regarding their involvement in previous litigation. Affirming, with more explanation than it has ever given on such an issue, the Court held:

> "An examination of each juror's failure to respond demonstrates that the trial court did not abuse its discretion in denying Volkswagen's motion for a new trial on this issue.
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> "Juror Syble Carr failed to reveal her involvement as a plaintiff in an action against Gulf Oil, filed in 1980 and removed to federal court in 1981. The action concerned her husband's involvement in a commercial lease of a Gulf Oil station. There were no allegations in the complaint that Syble Carr was in any way involved in the lease or in her husband's dispute with Gulf. Furthermore, Volkswagen presented no proof that Syble Carr was even aware that she was a party. Because the action did not involve any claim of personal injury, wrongful death, or products liability, there was no proof or even an inference that Mrs. Carr would have been predisposed toward the plaintiffs in this action.
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> "Juror Rachel Kirkland failed to disclose that she had been a defendant in an action filed in 1980. The case action summary sheet from that action shows that a default judgment for $3,498.90 was entered against her in September 1980. There is no indication from the record that Mrs. Kirkland appeared in the action, nor was there any evidence before the trial court that Mrs. Kirkland even knew that the default judgment had been taken against her. Because Rachel Kirkland had been a defendant in the prior litigation, any possible prejudice she might have had likely would have been against the plaintiffs, not Volkswagen.
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> "Juror Phillip McCarroll failed to reveal that he had been a defendant in a small claims filed in August 1990 that arose out of an automobile accident. The certified record from that action shows that a default judgment for $1,297.44 was entered against Mr. McCarroll, but there is no indication that he ever appeared in court. Furthermore, there was no evidence before the trial court that Mr. McCarroll even knew about the small claims action, and, as with juror Kirkland, any prejudice he might have had likely would have been against the plaintiffs, not Volkswagen."

Marinelli, 628 So. 2d at 389.

In *Williston v. Ard*, 611 So. 2d 274 (Ala. 1992), the Alabama Supreme Court affirmed the trial court's refusal to grant a new trial where three jurors, including the foreperson of the jury, failed to respond correctly to questions asked of them on *voir dire*. In *Williston*, plaintiffs'

counsel asked the prospective jurors the following question:

> "'Have any of you or members of your family ever been a defendant in a lawsuit for damages? . . . Where somebody, in other words, sued you or made a claim against you or members of your family?'"

After the jury awarded plaintiffs $5.5 million, an investigation revealed that three of the jurors or members of their families had been involved in events that required an affirmative response to plaintiffs' *voir dire* question. The Alabama Supreme Court, however, affirmed the jury's verdict, finding that the jurors had simply failed to respond about collections and small claims matters. The Court explained:

> "From the evidence, the trial court could have found inadvertence on the part of the jurors or a misunderstanding of the question as it related to them. In fact, in its order denying Dr. Williston's post-trial motions, the trial court construed the phrase 'a lawsuit for damages' to summarily exclude collection cases from consideration and found that Dr. Williston 'suffered no injury or prejudice from several potential jurors who failed to disclose that they or members of their family had been defendants in debt collection cases.'"

Williston, 611 So. 2d at 277.[1]

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[1]The Alabama Supreme Court has consistently affirmed trial courts' findings of no prejudice in cases involving failure to reveal prior litigation. *See, e.g., Campbell v. Williams*, 638 So. 2d 804 (Ala. 1994) (juror failed to respond to ambiguous questions and had failure recollecting information); *Haisten v. Kubota Corp.*, 648 So. 2d 561 (Ala. 1994) (four jurors failed to reveal that they or a family member had previously been involved in litigation – two jurors failed to disclose small claims actions and two jurors failed to disclose prior litigation which they had no knowledge of until plaintiffs' attorney told them); *Eaton v. Horton*, 565 So. 2d 183, 185 (Ala. 1990) (in fraud action, juror failed to reveal that he and his wife had been plaintiffs in a fraud action); *Land & Assocs, Inc. v. Simmons*, 562 So. 2d 140, 147-49 (Ala. 1989) (one juror failed to reveal that she had been a plaintiff in a personal injury action arising out of a automobile accident; a second juror failed to reveal that he had been sued in district court in a subrogation action brought by an insurer; the third juror failed to reveal that he and his wife had been defendants in an action on a promissory note, which had been stayed when they filed a petition for bankruptcy); *Ensor v. Wilson*, 519 So. 2d 1244, 1264-65 (Ala. 1987) (two jurors failed to reveal that either they or a member of their family had previously filed actions for damages arising out of automobile accidents; another juror failed to reveal that he had once been named a co-defendant in a lawsuit by a subcontractor-materialman against the contractor who built the

In *Reed v. Tucker*, 598 So. 2d 840 (Ala. 1992), the Alabama Supreme Court affirmed the trial court's denial of defendant's motion for new trial on the basis of a juror's failure to respond. In *Reed*, plaintiff sued for assault and battery after defendant punched plaintiff in the face and broke his nose in three places. During voir dire, plaintiff's attorney asked if any of the prospective jurors knew defendant personally. The juror in question, Juror Tammy Harden, did not respond. At the close of evidence the jury awarded plaintiff $16,120 in damages.

In his motion for new trial, defendant contended that he and Juror Harden rode on the school bus together 16 or 17 years prior to the trial and that, on one occasion, Juror Harden had "struck [defendant] on the head with a cake pan." Defendant also claimed that on the day after the trial, Juror Harden approached him and asked: "How are you today?". Defendant asserted that the first time he recognized Juror Harden was when she approached him the day after trial. Juror Harden was not called to testify.

Finding no evidence of a willful failure to respond, the Court held: "[T]he mere fact that Harden spoke to [the defendant] *after* his trial does not show that Harden 'personally knew' him. Given the length of time between the cake pan incident and [the defendant's] trial, it is certainly possible that Harden did not remember Reed at the time of the trial. There was absolutely no

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juror's home); *Curry v. Lee*, 460 So. 2d 1280 (Ala. 1984) (a juror failed to reveal that she had previously been a defendant); *Burroughs Corp. v. Hall Affiliates, Inc.*, 423 So. 2d 1348 (Ala. 1982) (five jurors failed to respond that they had previously been a defendant or a plaintiff); *Estes Health Care Centers, Inc. v. Bannerman*, 411 So. 2d 109 (Ala. 1982) (one juror failed to reveal that he had been a defendant in two separate cases, an automobile collusion case and a collection suit by a hospital); *Parkinson v. Hudson*, 265 Ala. 4, 88 So. 2d 793 (1956) (a juror failed to reveal that he had previously been a plaintiff in an automobile-bus collision case, involving serious injuries).

evidence presented that showed Harden willfully failed to respond to a question she should have responded to."

The specificity of the questioning is crucial. In *McBride v. Sheppard*, 624 So. 2d 1069 (Ala. 1993), the Alabama Supreme Court held that plaintiffs were not entitled to a new trial where they alleged one of the jurors was illiterate. The Court explained:

> "This Court held that a new trial was required where the prospective jury venire was specifically asked whether each member could read and write the English language and each member indicated by silence that he or she could. However, we did not decide whether a new trial is *automatically* required every time § 12-16-60 is violated. Under the facts of the present case, the record does not indicate that juror J.F. was specifically asked whether he could read or write the English language and that he indicated by his silence that he could, although it is possible the jury venire was asked such a question. Nevertheless, the trial judge observed juror J.F. read and found that he could read at a level adequate to qualify for jury service."

McBride, 624 So. 2d at 1072 (emphasis in original).

In *Pearson v. State*, 343 So. 2d 538 (Ala. Crim. App. 1977), defendant's lawyer asked the veniremembers whether "anybody . . . [was] employed either by the City of Eutaw [sic] or by the County of Greene?". One of the veniremembers who subsequently sat on the jury failed to respond that she was an employee of the Greene County Hospital. Affirming the trial court's denial of defendant's motion for a new trial, the Court of Criminal Appeals held:

> "If any mistake was made in failing to answer affirmatively the question whether she was employed by Greene County, it is attributable to the failure to clarify the question in such a way as to show that it covered employees of the Greene County Hospital. A failure to answer a question on voir dire furnishes no basis for complaint, if the question as applied to a particular juror does not clearly call for an express response."

Pearson, 343 So. 2d at 542.

In *Drummond Co. v. Boshell*, 641 So. 2d 1240 (Ala. 1994), in a nuisance action regarding the placement of a transformer next to plaintiffs' home, defendant argued on appeal that it was prejudiced by statements made by a veniremember during *voir dire*. The colloquy which defendant alleged prejudiced it was as follows:

> "'MR. KING: Is it your recollection from your own personal experience that transformers do make sounds?
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> "'JUROR BROTHERS: I am familiar from the times when I worked with TASP Security, I worked in . . . Townley and Sayre and different places. I know it is if you are a security guard listening to all that noise. In my opinion –
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> "'THE COURT: What are you about to give us your opinion of?
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> "'JUROR BROTHERS: About the box, the transformer.
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> "'THE COURT: Sir, just a moment. I don't think your giving us your opinion of it is what we need.
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> "'JUROR BROTHERS: I am just speaking of the security guard work.
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> "'THE COURT: I don't think you need to be giving us an opinion of it if you are not a witness in this case, okay?
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> "'MR. KING: Mr. Brothers, when I asked you the question in qualifying you as a juror, is there anything about your knowledge of transformers or about your knowledge of this particular one up in Townley that would cause you . . . somehow to be biased in favor of the Drummond Company or against the Drummond Company or biased in favor the Boshells or against the Boshells so that you couldn't be fair in . . . this case?
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> "'JUROR BROTHERS: Well, like I say, as far as favoring Drummond, I have worked for Drummond as [a] security guard around the transformer, and being a security guard, we had to work around them, and I understand the effect on him just being there. And it's very loud and it's very bad on your health and I can understand how it is on this man's health.'"

Boshell, 641 So. 2d at 1244-45. Affirming the trial court's denial of a new trial, the Court held that after reviewing the colloquy it could not say that defendant was probably prejudiced.

C. Questions Regarding Insurance

In *Burlington Northern R.R. Co. v. Whitt*, 575 So. 2d 1011 (Ala. 1990), *cert. denied*, 111 S. Ct. 1415 (1991), a grade-crossing case, the Alabama Supreme Court held that the trial court did not err in permitting plaintiff to ask the veniremembers "Anybody here who is an insurance adjuster?". The Court held that the inquiry was legitimate and did not result in eradicable prejudice, where no member of the venire responded to the question and no follow-up questions were asked. Specifically, the Court ruled:

> "Besides, we believe that the question 'Anybody here who is an insurance adjuster?' was proper. It is undisputed that the attorneys have the broad right to question venire as to any matters that disclose a prospective juror's bias, prejudice, or interest in the outcome of a trial. Inquiries such as whether the venire members or anyone in their families is employed by, for example, a trucking company, a bank, or a railroad, or is self-employed provide useful information about a juror's possible biases and allegiances. Limiting this otherwise broad right to question prospective jurors so as to exclude only the right to ask about insurance impermissibly hinders *voir dire* examination and is not justifiable. In attempting to strike a fair and impartial jury, attorneys have a legitimate interest in learning about any associations the venire has with the case, including the kind of work the prospective jurors and members of their families engage in.
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> "'It is a fact of life that no matter how honest and conscientious an individual may be, it is most likely to be influenced, if not actually biased, by his past or present occupational experiences.'" *Landers v. Long*, 53 Ala. App. 340, 343, 300 So. 2d 112, 114 (Ala. Civ. App. 1974). A general inquiry during *voir dire* such as the one made in the present case adequately protects the plaintiff's interest in securing an impartial jury and does not inevitably indicate to the venire that insurance is involved in the case. Insofar as the majority opinion in *Cooper* differs from the views expressed here, it is expressly overruled and the majority opinion in *Alabama Power Co. v. Bonner* is again adopted as a law of this capitalist state.[2]

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[2]Prior to *Whitt*, the Court held in *Cooper v. Bishop Freeman Co.*, 495 So. 2d 559 (Ala. 1986), that inquiry into the jury venire's relationships with the defendant's insurance carrier must be limited to asking whether any member of the panel is or was an officer, stockholder, agent, servant, or employee of the insurer, rather than asking whether any family member

> "Even if we were not convinced that the question is an appropriate one for *voir dire* examination, we could not reverse because of the trial judge's allowing the question. There was no objection to the question when it was asked. Four additional questions were asked before any objection was made to the question, 'Anybody here who is an insurance adjuster?'. Failure to lodge a timely objection to an improper question asked on *voir dire* waives the point as error on appeal."

Whitt, 575 So. 2d at 1018.

In *McLain v. Routzong*, 608 So. 2d 722 (Ala. 1992), the trial court permitted plaintiffs to question prospective jurors as to whether they were stockholders, directors, officers, or employees of defendant's liability carrier, Allstate. The trial court, however, refused to permit plaintiff to ask the veniremembers whether they were an officer or stockholder of ***plaintiff's own uninsured motorist carrier***, Southern Guaranty Co. The trial court also refused to permit plaintiffs to ask the veniremembers: "Have you or any member of your family ever been

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worked for an insurer. *Cooper*, however, overruled *Alabama Power Co. v. Bonner*, 459 So. 2d 827 (Ala. 1984). In *Bonner*, the Court ruled that a trial court may properly allow a venire to be questioned on whether their families work for or adjust claims for any insurance company. The Court held that such information is clearly material to a trial lawyer's right to exercise his peremptory strikes whether it falls short of producing information which would disqualify a jury. *Whitt* essentially marked a return to the law as it existed prior to *Cooper*.

Even before *Whitt*, the Alabama Supreme Court had allowed some erosion of the holding in *Cooper*. For example, in *Shelby County Commission v. Bailey*, 545 So. 2d 743 (Ala. 1989), the Court held that the question "Have any of you or any members of your family ever worked in the claims department of *any company*?" did not impermissible inject insurance into the case. The Court held that this question did not impermissible inject insurance because

> "claims department employment exists in many areas other than with insurance companies. A plaintiff's lawyer could reasonably suspect that a person who had processed claims might be an unfavorable juror. To hold that this question necessarily injects insurance into the voir dire requires an inappropriately narrow view of the reasons for asking potential jurors if they have worked in a claims department. Merely asking about employment in a claims department of a company or government agency does not improperly inject insurance into the *voir dire*."

involved with an employment where your job was to evaluate claims?".

Affirming, the Alabama Supreme Court first held that the trial court properly refused to allow plaintiffs to question the venire regarding their association with Southern Guaranty. Additionally, the Court held that the trial court did not err in refusing the permit plaintiffs to ask veniremembers: "Have you or any member of your family ever been involved with an employment where your job was to evaluate claims?".[3] In support of its holding, the Court reasoned:

> "Nothing in the facts of this case suggests how the [plaintiffs'] question concerning whether a juror or a member of a juror's family was or had ever been employed in a position that involved evaluating claims was material to their right to exercise their peremptory strikes -- the denial of that question did not impair the [plaintiffs'] ability to select a jury composed of men and women qualified and competent to judge and determine [the defendant's] liability without bias, prejudice, or partiality."

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[3]In refusing to reverse the trial court, the Court noted:

> "This Court has not reversed a judgment either for the trial court's permitting or for its not permitting the parties to inquire on *voir dire* whether a member of a venire person's family worked as an insurance adjuster . . . ; whether any member of the venire was related to an insurance adjuster employed by the insurance company involved in the case . . . ; or whether any member of the venire was an insurance adjuster . . . . It is an abuse of discretion for a trial court to so limit the *voir dire* examination as to infringe upon a litigant's ability to determine whether a prospective juror is free from bias or prejudice and thereby to effectively exercise his strikes."

D. Other Inquiries

In *Wang v. Bolivia Lumber Co.*, 516 So. 2d 521 (Ala. 1987), after the jury returned a verdict for defendants in a personal injury case arising from an automobile accident, plaintiff appealed, arguing, among other things, that the trial court erred in refusing to permit her to ask the veniremembers "what effects, if any, the recent 'propaganda' supplied by insurance companies would have on their decision in this case." The trial court refused to permit the question because he found that "the inquiry had no benefit and would have clouded the jury's reasoning upon deliberation of the case." Affirming, the Alabama Supreme Court simply held:

> "In *Heath v. State*, 480 So. 2d 26, 28 (Ala. Crim. App. 1985), the Court of Criminal Appeals stated:
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> > "'"[W]hile wide latitude should be accorded the parties in their voir dire examination of prospective jurors touching their qualifications, interest or bias, the extent of the examination is largely discretionary with the trial court.' *Welborn v. Snider*, 431 So. 2d 1198, 1201 (Ala. 1983). Although a liberal inquiry should be afforded counsel, the scope of voir dire examination is within the sound discretion of the trial judge.'
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> "We cannot say that the trial court abused its discretion on this issue."

Wang, 516 So. 2d at 522.

In *Nodd v. State*, 549 So. 2d 139 (Ala. Crim. App. 1989), the Alabama Criminal Court of Appeals held that, in any prosecution where the State's case depends primarily on police testimony, a defense attorney had the right to inquire, either through counsel or through the trial judge, whether any of the veniremembers might be inclined to give more credence to testimony of a police officer.

III. AFTER QUESTIONING: CHALLENGES FOR CAUSE AND PEREMPTORY CHALLENGES

A. Challenges For Cause

Alabama Code Section 12-16-150 provides:

"It is good ground for challenge of a juror by either party:

"(1) That the person has not been a resident householder or freeholder of the county for the last preceding six months.

"(2) That he is not a citizen of Alabama.

"(3) That he has been indicted within the last 12 months for felony or an offense of the same character as that with which the defendant is charged.

"(4) That he is connected by consanguinity within the ninth degree, or by affinity within the fifth degree, computed according to the rules of the civil law, either with the defendant or with the prosecutor or the person alleged to be injured.

"(5) That he had been convicted of a felony.

"(6) That he has an interest in the conviction or acquittal of the defendant or has made any promise or given any assurance that he will convict or acquit the defendant.

"(7) That he has a fixed opinion as to the guilt or innocence of the defendant which would bias his verdict.

"(8) That he is under 19 years of age.

"(9) That he is of unsound mind.

"(10) That he is a witness for the other party.

"(11) That the juror, in any civil case, is plaintiff or defendant in a case which stands for trial during the week he is challenged or is related by consanguinity within the ninth degree or by affinity within the fifth degree, computed according to the rules of the civil law, to any attorney in the case to be tried or is a partner in business with any party to such case.

> "(12) That the juror, in any civil case, is an officer, employee or stockholder of or, in case of a mutual company, is the holder of a policy of insurance with an insurance company indemnifying any party to the case against liability in whole or in part or holding a subrogation claim to any portion of the proceeds of the claim sued on or being otherwise financially interested in the result of the case."

In addition to the statutory challenges specified above, the Alabama Supreme Court also recognizes common law challenges for cause. *CSX Transportation, Inc. v. Dansby*, [Ms. 1921512], __ So. 2d __ (Ala. Feb. 24, 1995); *Wallace v. Alabama Power Co.*, 497 So. 2d 450 (Ala. 1986). "A common law challenge for cause[, however,] must entail '"some matter which imports absolute bias or favor, and leaves nothing for the discretion of the court."'" *CSX*, *supra* (quoting *Wallace*, *supra* (quoting *Brown v. Woolverton*, 219 Ala. 112, 115, 121 So. 404, 406 (1928))).

A challenge for cause is made by facts, drawn from the prospective juror's answers, that renders that juror unqualified to sit on the jury. The test to be applied is that of "*probable prejudice.*" *Wood v. Woodham*, 561 So. 2d 224, 227 (Ala. 1989) (citing *Alabama Power Co. v. Henderson*, 342 So. 2d 323, 327 (Ala. 1976) ("[W]hile probable prejudice for any reason will serve to disqualify a prospective juror, qualification of a juror is a matter within the discretion of the trial court.")). *Probable prejudice* for any reason disqualifies a prospective juror. *Grandquest v. William*, 273 Ala. 140, 135 So. 2d 391 (1961). "Ultimately, the test to be applied is whether the juror can set aside her opinions and try the case fairly and impartially, according to the law and the evidence."

As stated above, these determinations are to be made based on the prospective juror's answers and demeanor. The exception is when the prospective juror indicates initially that

he/she "is biased or prejudiced or has deep-seated impressions." *Knop v. McCain*, 561 So. 2d 229, 234 (Ala. 1989). The Alabama Supreme Court noted in *Knop*:

> "However, once a juror indicates initially that he or she is biased or prejudiced or has deep-seated impressions, so as to show that he or she cannot be neutral, objective, or impartial, then the challenge for cause must be granted. This is particularly true when a juror . . . volunteers her doubts . . . . [H]er initial response, particularly in light of her volunteering this information, shows probable prejudice, and that showing of probable prejudice required that she be dismissed for cause."

In *CSX Transportation Inc. v. Dansby*, [Ms. 1921512], __ So. 2d __ (Ala. Feb 24, 1995), the Alabama Supreme Court considered whether the trial court erred in refusing to remove for cause a prospective juror who was employed by the defendant, CSX. Although the Court recognized that, at common law, an employee of a party was subject to challenge for cause, the Court did not err in denying CSX's challenge for cause because none of the prospective juror's "*voir dire* responses demonstrated that he would be biased in favor of, or against, CSX." In order to reach such a decision the Court adopted a new two-pronged approach:

> "[I]f the employer makes the challenge, it must make a showing of prejudice of bias on the part of its employee, when it challenges for cause the employee's qualifications for serving as a juror in its case. If the employer can justify its motion by proving that the employee will be prejudiced in some manner as a trier of fact, then the trial court should strike that prospective juror for cause. Without such proof, the trial court should not strike the employee for cause. The party opposing the employer of the prospective juror, however, should be allowed a challenge for cause against the prospective juror, under the [common law] rule stated in *Kendrick [v. Birmingham S. Ry.*, 254 Ala. 313, 48 So. 2d 320 (1950)] without a showing of bias or prejudice.
>
> "Our two-pronged approach to this issue is based upon a recognition of the unique relationship between an employer and its employee. Undoubtedly, this relationship implies a partiality on the part of that employee in favor of the employer. We must presume that the employer and the employee have a friendly working relationship. If such a relationship does not exist, then the employer, to have a challenge for cause, must show the court what the true relationship is. Conversely, a party opposing the employer should not be required to show

prejudice in order to challenge the employee; when that party challenges the employee, a prejudice in favor of the employer must be presumed to exist, and the trial court is consequently left without discretion in ruling on the challenge for cause. As for the employer, there is no reason that is cannot carefully question its employee during voir dire so that the trial court may determine, within its discretion, whether the employee has such prejudice as will support the employer's challenge for cause."

In *Sealing Equipment Products Co. v. Verlarde*, 644 So. 2d 904 (Ala. 1994), the Alabama Supreme Court held that the trial court did not err when it struck a juror for cause after she expressed her dislike for punitive damages. Specifically, the juror responded "I'm against punitive damages.", and later indicated that she was not against compensatory damages, "[b]ut just getting a big number out of the sky –". The Court explained that because the trial judge was able to observe the juror's demeanor and because the juror's "initial statement was [not] vague, ambiguous, equivocal, uncertain, unclear, or confused," the trial court did not abuse its discretion in striking the juror for cause.

In *Boykin v. Keebler*, 648 So. 2d 550 (Ala. 1994), after the jury returned a verdict for the defendant doctor, the Alabama Supreme Court considered whether the trial court erred in refusing to strike a juror for cause. In *Boykin*, the juror at issue stated during *voir dire* that her daughter was a patient of Dr. Crocker. Dr Crocker was the doctor who aided the defendant doctor in plaintiff's surgery; was a key defense witness; and, because of his professional partnership with the defendant, was in a position similar to the defendant. After considering the juror's responses to questions regarding her relationship with Dr. Crocker,[4] the Court reversed

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[4]The colloquy which occurred was as follows:

"'Mrs. H.: My daughter has . . . been treated by Dr. Crocker.

"'. . .

"'THE COURT: . . . Regarding the fact that your daughter has been a patient of Dr. Crocker, would that have a tendency for you to lean more toward one side of the case than the other side of the case?

"'Mrs. H.: It might.

"'THE COURT: Could you give both sides a fair and just trial in this case?

"'Mrs. H.: I would do my very best, sir.

"'THE COURT: But could you?

"'Mrs. H.: I believe I could.

"Boykin's attorney further questioned Mrs. H.:

"'BROWN: Let me ask you this: since you've been here for a while then first of all, do you happen to know Dr. Keebler or any members of his family?

"'Mrs. H.: Not Dr. Keebler, no. I know he works with Dr. Crocker. My child has been to Dr. Crocker.

"'BROWN: I guess having put your child in the care of one of the witnesses in the case, Dr. Crocker, who is also through his firm I guess in the sense of their partnership or their professional association is a member of this lawsuit, does it cause you a conceptional problem in the sense that you have entrusted Dr. Crocker with the care of your child and that you would be called upon to render a verdict in a case which involved Dr. Crocker as one of the surgeons; would that cause you some difficulty?

"'Mrs. H.: My conscience tells me to answer in the affirmative. Yes, sir.

"'BROWN: Okay. One other question: I guess I could follow up on that and probably I should in fairness to my client. Your conscience is telling you to answer that in the affirmative just in the sense that you place your trust in Dr. Crocker. Would you explain that for us?

"'Mrs. H.: When I answered earlier that I would do my best to be fair and to look at both sides and to answer the way I thought it should be answered. But I might feel bad if I had to go back to Dr. Crocker knowing that I had.

"'BROWN: . . . [I]f the evidence was presented in the case that would be of

and held that the trial court erred in refusing the strike the juror for cause. The Court explained:

> "Mrs. H.'s vacillation during voir dire, particularly her admission that she 'might feel bad if [she] had to go back to Dr. Crocker' after serving on the jury in this case, indicated prejudice and bias that disqualified her from serving on the jury; therefore, the trial court should have struck her for cause. *Wright v. Holy Name of Jesus Medical Center*, [628 So. 2d 510 (Ala. 1993)]; *Bell v. Vanlandingham*, [633 So. 2d 454 (Ala. 1994)]."

Boykin, 648 So. 2d at 552. The Court also noted that "the same 'probable prejudice' [that] arises where a patient sits as a juror in judgment in his physicians case" would arise where the juror sits in judgment of his/her child's physician because "it is clear that the association between a mother and the doctor who treats her child is inherently a close, personal relationship built upon trust and confidence." *Id.*

In *Bell v. Vanlandingham*, 633 So. 2d 454 (Ala. 1994), in a medical malpractice case, the Alabama Supreme Court held that the trial judge erred in refusing to strike a juror who stated that the defendant doctor was his family physician and that "he would feel 'awkward' *serving on the jury*." *Bell*, 633 So. 2d at 455.[5]

> sufficient nature to convince you that negligence had been committed in this case and that negligence caused Mr. Boykin to lose his life untimely, would you have some hesitancy at that point based on what you have told us, you would still have this nagging problem as I understand it?
>
> "'Mrs. H.: If the evidence told me that negligence was there I believe I would have to say that yes I thought negligence was there."

Boykin, 648 So. 2d at 551-52.

[5]The Court also found that the trial court did not err in refusing to strike two other jurors for cause. One juror, a pastor, "voiced concern at the conclusion of voir dire as to whether he could be objective, given that many members of his congregation were also patients of [the defendant doctor] and that he often visited patients at the hospital where [the doctor] worked"

For other medical malpractice cases see *Knop v. McCain*, 561 So. 2d 229 (Ala. 1989) (holding that two jurors should have been dismissed for cause; one juror thought people were too quick to sue and would require overwhelming evidence and another juror taught the doctor's children in school and was not sure whether that would affect her judgment); *Wood v. Woodham*, 561 So. 2d 224 (Ala. 1989) (holding three jurors should have been dismissed for cause because each had worked in various areas of health care and each was initially uncertain whether their affiliation with the health care field would affect their participation in a malpractice case); *Vaughn v. Griffith*, 565 So. 2d 75 (Ala. 1990) (holding that the trial court could deny a challenge for cause to a juror who had been a student of one of the defendant's sisters in elementary school); *Dixon v. Hardey*, 591 So. 2d 3 (Ala. 1991) (holding that the trial court committed reversible error by refusing to excuse for cause a prospective juror who admitted being a patient of the defendant doctor); *Wright v. Holy Name of Jesus Medical Center*, 628 So. 2d 510 (Ala. 1993) (holding the trial court committed reversible error by refusing to excuse for cause a prospective juror who admitted she was a patient of the defendant doctor and who indicated that she would feel "awkward" returning to the doctor after serving on the jury).

In *Haisten v. Kubota Corp.*, 648 So. 2d 561 (Ala. 1994), the Alabama Supreme Court considered whether the trial court erred in refusing to strike a juror for cause after she stated that she knew the children of one of the attorneys for defendant. Affirming, the Court held:

> "With respect to the determination of whether a prospective juror should be excluded for cause based on an inability to render a fair and impartial verdict,

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The Court reasoned: "[T]he fact that [he] might 'feel a little uncomfortable' sitting on the jury was not an adequate ground to support a challenge for cause." Another juror had been a patient of [the doctor] in the past, but they did not have an on-going doctor-patient relationship; "thus, there [was] no presumption of probable prejudice as to this juror."

the trial judge is in the best position to observe the juror's demeanor and tone in response to counsel's questions and to determine what the response means.

"The trial judge questioned the potential juror. The trial judge observed her demeanor and weighed her answers accordingly. She was asked whether she could render a fair and impartial verdict, and she answered affirmatively. The record shows no abuse of discretion."

Haisten, 648 So. 2d at 564.

In *Kinder v. State*, 515 So. 2d 55 (Ala. Crim. App. 1986), the Alabama Court of Criminal Appeals held that a juror's mere expression of opinion which is based on rumor does not render the juror incompetent as long as he does not have a fixed opinion which would bias his verdict. Thus, where a juror states that he has opinions regarding the case but that he could try the case fairly and impartially according to the law and the evidence and that he would not allow his opinion to influence his decision, it is not error for a trial judge to deny a challenge for cause. *See also Johnson v. State*, 497 So. 2d 844 (Ala. Crim. App. 1986); *Smith v. State*, 581 So. 2d 497, 503 (Ala. Crim. App. 1990).

In *City of Gulf Shores v. Harbert International*, 608 So. 2d 348 (Ala. 1992), the Alabama Supreme Court held that it was harmless error for the trial court to excuse a juror for cause because he was a citizen of Gulf Shores. Although the Court recognized that under Section 12-16-3 a citizen of a city which is party in a lawsuit is not disqualified, the Court held that no reversible error occurred because Gulf Shores failed to show "how [the juror's] being excused for cause 'has probably injuriously affected substantial rights of the parties.'"

In *Ellington v. State*, 580 So. 2d 1367 (Ala. 1990), during a criminal trial, one of the veniremembers admitted that her ability to fairly judge the issues at trial would be affected because her husband worked for the police department and because two of the detectives from

the police department would be testifying at trial. The Alabama Supreme Court reversed the criminal conviction, holding that the trial court abused its discretion in refusing to strike the juror for cause.

B. Peremptory Challenges

The most dramatic changes regarding *voir dire* have occurred within the last two years in the area of peremptory challenges. First, in April of 1994, the United States Supreme Court extended *Batson* challenges to gender and held that "litigants may not strike potential jurors solely on the basis of gender." *J.E.B. v. Alabama ex rel. T.B.*, 128 L. Ed. 2d 89, 105-06 (1994). Second, in May of this year, the United States Supreme Court revisited its three-part test in *Batson* to explain that the second prong of *Batson*, the portion of the test which requires "the proponent of the strike to come forward with a race-neutral explanation," "does not demand an explanation that is persuasive, or even plausible." *Purkett v. Elem*, 131 L. Ed. 2d 834, 839 (1995).

In *J.E.B. v. Alabama ex rel. T.B.*, 128 L. Ed. 89 (1994), the United States Supreme Court recognized that "whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *J.E.B.*, 128 L. Ed. 2d at 97. The Supreme Court, therefore, extended *Batson* to gender and held that parties cannot use their peremptory challenges to discriminate on the basis of race or gender. *Batson v. Kentucky*, 90 L. Ed. 2d 69 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 128 L. Ed. 2d 89 (1994). In holding that there must be a race-neutral and/or a gender-neutral purpose for a litigant's exercise of

peremptory challenges, the Court subjected the use of these challenges "to the scrutiny of the Equal Protection Clause."[6] *Batson*.

Batson recognizes that a *single* instance of discrimination is enough to invoke constitutional concerns, "[a] single invidiously discriminatory . . . act is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" *Batson*, 90 L. Ed. 2d at 87 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 n.14 (1977)). Thus, the Alabama courts have interpreted *Batson* to mean that its purpose is to eliminate, not merely minimize, racial discrimination in jury selection. In *Owens v. State*, 531 So. 2d 22, 26 (Ala. Crim. App. 1987), the court noted:

> "It is important to emphasize . . . that under *Batson*, the striking of a single black juror for a racial reason violates the Equal Protection Clause, even

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[6]Based on this language in *Batson*, the Supreme Court later extended *Batson* to civil cases. *Edmondson v. Leesville Concrete Co.*, 114 L. Ed. 2d 660 (1991). The Court held: "Recognizing the impropriety of racial bias in the courtroom, we hold the race-based exclusion violates the equal protection rights of the challenged jurors."

The Alabama Supreme Court also adopted the *Batson* principles for use in civil jury trials in state court. *Thomas v. Diversified Contractors*, 551 So. 2d 343 (Ala. 1989). Relying on the Eleventh Circuit's decision in *Fludd v. Dykes*, 863 F. 2d 822 (11th Cir. 1989), the Court explained:

> "'There are times when a party has enough peremptory challenges to remove all of his adversary's racial peers from the venire and indeed exercises them for the purpose of obtaining a petit jury that may have greater sympathy for him than his adversary. This situation obviously arises in the civil context as well. Nor can we perceive any distinction in the harm to the individual's constitutional rights. Finally, we see no reason why a civil litigant would be unduly prejudiced by explaining the purpose of a strike where the circumstantial evidence indicates that he made it for a discriminatory purpose.'"

Thomas, 551 So. 2d at 345 (quoting *Fludd*, 863 F.2d at 828-29); *Accord, Fowler v. Family Dollar Stores, Inc.*, 571 So. 2d 1102 (Ala. 1990); *Moore v. Ray Sumlin Const. Co.*, 570 So. 2d 573 (Ala. 1990); *Robinson v. Transit Authority*, 555 So. 2d 173 (Ala. 1989).

where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors.

* * *

"[E]xplanation of most of the strikes on non-racial grounds does not necessarily rebut the inference created by *Batson* that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"

Accordingly, a single invidious discriminatory peremptory challenge supports a valid *Batson* or *J.E.B.* objection.

Under *Batson*, and *J.E.B.*,[7] the opponent of a peremptory challenge must present a prima facie case of racial or gender discrimination. *Batson*, 90 L. Ed. 2d at 88. Once the opponent of the peremptory challenge has presented a prima facie case of discrimination, the burden shifts to the party striking to present a neutral explanation for challenging the juror. *Id.* The trial court will then determine if the opponent of the peremptory challenge had established purposeful discrimination. *Id.*

In the recent case of *Purkett v. Elem*, 131 L. Ed. 2d 834 (1995), the United States Supreme Court examined the burdens created in *Batson*. In *Purkett*, after being convicted of second-degree robbery in a Missouri court, defendant appealed, arguing that the prosecutor's use of

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[7] *J.E.B.* provides:

"As with race-based *Batson* claims, a party alleging gender discrimination must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike. When an explanation is required, it need not rise to the level of a 'for cause' challenge; rather, it merely must be based on a juror characteristic other than gender, and the proffered explanation may not be pretextual."

J.E.B., 128 L. Ed. 2d at 106-07.

peremptory strikes to strike two black men from the jury violated *Batson*. At trial, the prosecutor had explained the reason for his strikes as follows:

> "'I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and goatee type beard. Those are the only two people on the jury . . . with facial hair . . . And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.'"

Purkett, 131 L. Ed. 2d at 838. "The prosecutor further explained that he feared that juror number 24 who had a sawed-off shotgun pointed at him during a supermarket robbery, would believe that 'to have a robbery you have to have a gun, and there is no gun in this case." *Id.* at 838. Reasoning that "the prosecution must at least articulate some plausible race-neutral reason for believing that those factors will somehow affect the person's ability to perform his or her duties as a juror," the Eighth Circuit granted defendants writ of habeas corpus. The court explained:

> "In the present case, the prosecutor's comments, 'I don't like the way [he] look[s], with the way the hair is cut. . . . And the mustache[] and beard[] look suspicious to me,' do not constitute such legitimate race-neutral reasons for striking juror 22."

Id.

The United States Supreme Court held, however, that the Eighth Circuit erred in its ruling "by combining *Batson's* second and third steps into one, requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive, *i.e.*, a 'plausible' basis for believing that 'the person's ability to perform his or her duties as a juror' will be affected." *Id.* at 839. Instead, the Court explained,

> "[i]t is not until the *third* step that the persuasiveness of the justification becomes relevant — the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. *Batson, supra*, at 98, 90 L. Ed. 2d 69, 106 S. Ct. 1712; *Hernandez, supra*, at 359, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (plurality opinion). At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge *may choose to disbelieve* a silly or superstitious reason at step 3 is quite different from saying that a trial judge *must terminate* the inquiry at step 2 when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rest with, and never shifts from, the opponent of the strike."

Id. In other words,

> The second step of this process does not demand an explanation that is persuasive, or even plausible. 'At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."

Id.

Finally, the Alabama Supreme Court has noted that when a timely objection is made under *Batson*, the trial court must conduct a hearing into the allegations of discrimination outside the presence of the jury. *See Harrell v. State*, 555 So. 2d 263 (Ala. 1989). Prior to *Purkett*, once the offended party established the inference of discrimination, the burden of proof shifted and Alabama courts required the striking party to articulate *clear, specific, and legitimate reasons* for the challenge *which related to the particular case to be tried, and which were non-discriminatory*. *See, e.g., Ex parte Lynn*, 543 So. 2d 709, 713 (Ala. Crim. App. 1988) (quoting *Ex parte Branch*, 526 So. 2d 609, 623 (Ala. 1987). How clear, specific and legitimate the reasons have to be under *Purkett* is unclear; the Court simply holds that "the issue is facial validity." Surely, even after *Purkett*, mere general assertions of non-discrimination are still insufficient to overcome the victim's *prima facie* showing of discrimination. *Batson*, 90 L. Ed.

2d at 88 ("[T]he prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he merely challenged jurors of the defendant's race on the assumption -- or his intuitive judgment -- that they would be partial to the defendant because of their shared race."); *Ricks v. State*, 542 So. 2d 289, 291 (Ala. Crim. App. 1987). Similarly, counsel's professional or "intuitive judgment of suspicion" is wholly insufficient. *Ex parte Branch*, 526 So. 2d 609, 623 (Ala. 1987) (citing *Batson*, 90 L. Ed. 2d at 86); *see also Ex parte Bankhead*, 625 So. 2d 1146, 1148 (Ala. 1993) (holding that striking a prospective juror based on a "gut-reaction" is an insufficient race-neutral reason).

In *Ex parte Branch*, 526 So. 2d 609 (Ala. 1987), the Alabama Supreme Court enumerated a non-exhaustive list of the type of evidence a trial court could use to determine whether the opposing party presented a *prima facie* case of discrimination:

> "(1) Evidence that the 'jurors in question' shared only this one characteristic -- their membership in the group -- and that in all other respects they [were] as heterogeneous as the community as a whole.
>
> "(2) A pattern of strikes against black jurors on a particular venire; e.g., four of six peremptory challenges were used to strike all blacks from the jury venire.
>
> "(3) The past conduct of the state's attorney in using peremptory challenges to strike all blacks from the jury venire.
>
> "(4) The type and manner of the state's attorney's questions and statements during voir dire, including nothing more than desultory voir dire.
>
> "(5) The type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions.
>
> "(6) Disparate treatment of members of the jury venire with the same characteristics, or who answer a question in the same or similar manner.

"(7) Disparate examination of members of the venire, i.e., a question designed to provoke a certain response that is likely to disqualify a juror was asked to black jurors, but not to white jurors.

"(8) Circumstantial evidence of intent may be proven by disparate impact where all or most of the challenges were used to strike blacks from the jury.

"(9) The State used peremptory challenges to dismiss all or most black jurors."

Id. at 622-23.

The Court in *Ex parte Branch* also provided examples of the type of evidence that can be used to overcome the presumption of discrimination and show neutrality:

"(1) The State challenged non-black jurors with the same or similar characteristics as the black jurors who were struck.

"(2) There is no evidence of a pattern of strikes used to challenge black jurors; e.g., having a total of six peremptory challenges, the State used two to strike black jurors and four to strike white jurors, and there were blacks remaining on the venire."

Id. at 623.

Recent Peremptory Challenge Decisions Before *Purkett*

In *Hernandez v. New York*, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991), a criminal defendant challenged a prosecutor's peremptory challenges in excluding latinos from the jury by reason of their ethnicity. The prosecutor's reasons for excluding the latinos form the jury was that he was uncertain whether they would be able to listen and follow the interpreter, because there was going to be Spanish-speaking witnesses. The prosecutor did not feel that the latino jurors would accept the interpreter's translation of the Spanish-speaking witnesses' testimony. The United States Supreme Court held that this was a sufficiently race-neutral explanation for challenging the latino-potential jurors and thus did not violate *Batson*.

In *Olsen v. Rich*, [Ms. 1931196], ___ So. 2d ___ (Ala. March 17, 1995), after the jury rendered a verdict for defendants in a medical malpractice case, plaintiffs appealed, arguing, among other things, that the trial court erred in overruling their *Batson* objection. In *Olsen*, after the trial court reduced the venire to a panel of 30 members, 6 of the veniremembers were black. Defendants used 5 of their 9 peremptory strikes to remove black veniremembers. Defendants offered a reason for each strike.

With regard to the first veniremember defendants struck, defendants explained that they struck him because he was disabled, because he was the same age as one of the plaintiffs, and because he did not respond or react well to several questions posed by defendants. Although the Court recognized that defendants did not strike white veniremembers that were the plaintiffs age, the Court noted that the primary reason for striking the veniremember was because he was disabled and defendants feared he would unduly sympathize with the plaintiff. Finding no discrimination, the Court held: "When determining whether a proffered explanation is a sham or pretext, the court may consider whether 'persons with the same or similar characteristics as the challenged juror were not struck.' The record indicates that [the veniremember] was the only veniremember -- white or black -- with a disability. Therefore, the trial court's determination that [the veniremember] was struck for a race-neutral reason was not clearly erroneous."

With regard to the second veniremember defendants struck, the defense counsel explained that he struck the veniremember because he stated the following:

> "I would have a problem based on, you know, if they are talking about cutting, and the injection of the needles and stuff like that. I would have a

problem there. Because, you know, I don't like going to a doctor myself, you know. But if that's part of it, I would have a problem with that."

Finding that defendants' reason was race-neutral, the Court explained: "This case was about blood and needles. [The veniremember's] statement sufficiently indicates that such a concern about the procedures to be discussed at the trial to support the defendant's contention that [he] was not struck because of race."

Defendants struck the third veniremember because she was unemployed and because of her demeanor during certain questions. Specifically, defendants contended that the veniremember did not respond well to questions regarding the jurors' making a commitment. Accepting defendants' explanation as race-neutral, the Court held: "We note, first, that the defense also struck a white veniremember solely because she was unemployed. Second, we note that the main reason articulated by defense counsel for striking [the veniremember] was her demeanor. This Court has recognized that demeanor, indicating such things as hostility or inattentiveness, is a race-neutral reason for a peremptory strike. *Jelks v. Caputo*, 607 So. 2d 177 (Ala. 1992); *Bell v. Lowery*, 619 So. 2d 1380 (Ala. 1993)."

Defendants struck the last two veniremembers because they were young and had unskilled, lower-pay jobs, who defendants believed would identify with a number of plaintiffs' witnesses who were also young with unskilled, lower-pay jobs. Noting that "[n]o white veniremembers were both young and unskilled, the Court found defendants' explanation to be race-neutral. The Court explained: "Factors such as age and employment are accepted as legitimate reasons for peremptory strikes where those factors, under the circumstances of the case, might make the potential jurors sympathetic to, or able to more easily identify with, a particular party. *Jelks*

v. Caputo, 607 So. 2d 177 (Ala. 1992); *Stephens v. State*, 580 So. 2d 11 (Ala. Crim. App. 1990)."

In *Millette v. O'Neal Steel, Inc.*, 613 So. 2d 1225 (Ala. 1992), an action to enforce a guarantee agreement, the Alabama Supreme Court found that plaintiff's lawyer had violated *Batson* by using his first four peremptory challenges to eliminate blacks from the venire. A jury of ten whites and two blacks was empaneled. After jury selection, defendants moved for a mistrial on the basis of *Batson*.

The first veniremember struck was a nurse. The plaintiff's attorney struck her because he "had some bad experiences before in juries with nurses. Nurses tend to be very, very sympathetic and I struck her for that reason." Additionally, the attorney stated that he was concerned that the nurse would be sympathetic toward the defendant because he had to use a special device to talk became his voice box had previously been removed. Citing *Bass v. State*, 585 So. 2d 225, 237 (Ala. Crim. App. 1991),[8] the Court held that the lawyer presented a sufficiently race-neutral reason.

With regard to the attorney's other strikes, however, the Court concluded that the proffered explanations for striking the remaining three blacks from the jury were inadequate. The explanation for striking the three remaining blacks was that one of them used two sentences without verbs or with improper verb forms. Counsel explained that it was important to his case that the jurors be able to understand documents and their modifications. The record showed, however, that the veniremember was a school teacher employed by the Jefferson County Board

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[8]In *Bass*, the Alabama Court of Criminal Appeals held that the prosecutor presented a race-neutral reason for striking a black veniremember because "she was a nurse and indicated that she had a relative who had had a nervous breakdown" and insanity was a possible defense.

of Education, who was required to hold a certificate issued by the State indicating that she met the minimum requirements for teaching. With respect to the other two jurors, the lawyer never asked questions concerning their educational background. Accordingly, the Court found that the lawyer had failed to articulate a credible, facially race-neutral explanation for striking the black jurors.

In *Henderson v. State*, 584 So. 2d 841 (Ala. Crim. App. 1988), defendant was charged with potentially causing the death of an individual by shooting him with a pistol. He was found guilty, and he was sentenced to death. The Court of Criminal Appeals upheld the sentence and held that the district attorney's provided valid race-neutral reasons for striking twelve black veniremembers. The attorney's reasons included (1) relationship to persons prosecuted by the district attorney; (2) acquaintance with defendant or his family; (3) religious convictions precluding passing judgment on others;[9] and (4) having been represented by defense attorney.

Other recent Alabama Supreme Court opinions regarding peremptory strikes include: *Meads v. RPM Pizza, Inc.*, 639 So. 2d 1352 (Ala. 1994) (holding that defendant's strike of a veniremember because she was a nanny and "nannies take care of people, are sympathetic to people who are hurt, and complain themselves about being hurt" was race-neutral); *K.S. v. Carr*, 618 So. 2d 707 (Ala. 1993) (holding defense counsel's proffered reasons for striking four black veniremembers were a sham or pretext – the explanation for one veniremember was inaccurate; some of the white veniremembers who were not struck had the same characteristics as one of the black veniremembers struck; and two of the veniremembers were struck for

[9]Note that the United States Supreme Court denied certiorari in a case where the Minnesota Supreme Court, *State v. Davis*, 504 N.W.2d 767 (Minn. 1993), refused to extend *Batson* to peremptory strikes made on the basis of religion. *Davis v. Minnesota*, 114 S. Ct. 2120 (1994).

reasons that were not fully articulated and that were not based on specific questions directed to those veniremembers on voir dire); *Zanders v. Alfa Mutual Ins. Co.*, 628 So. 2d 360 (Ala. 1993) (holding that striking a veniremember because he had previously been convicted of a crime was a sufficiently race-neutral); *Gilchrist v. Sizemore*, 628 So. 2d 409 (Ala. 1993) (holding that defendant's proffered reasons for striking five black veniremembers were sufficiently race-neutral – one juror was a former client of one of plaintiff's attorney's law firm; one juror had been a plaintiff in a previous action and had been a patient at Cooper Green Hospital (defendants anticipated the introduction of documents from Cooper Green Hospital); one juror's husband and daughter had been in a rear-end collision and her mother had been a patient at Cooper Green Hospital; one juror had been a plaintiff in an car accident case and had been a patient at Cooper Green Hospital; and one juror was a professional truck driver who had been in a rear-end collision and who had been a patient at Cooper Green Hospital); *Bell v. Lowery*, 619 So. 2d 1380 (Ala. 1993) (holding, based on a limited record and deferring to the trial court's ruling, that defendant's proffered reasons were sufficiently race-neutral); *Jelks v. Caputo*, 607 So. 2d 177 (Ala. 1992) (Defense counsel struck two black women, among others, because they were approximately the same age as the plaintiff, were unmarried, and were professionals. The trial court noted that defendant had not struck a white female doctor who was unmarried and replaced the white doctor with one of the black females. On review, the Alabama Supreme Court held that because the white juror had been replaced, the two strikes were valid.); *Ray Simlin Construction Co. v. Moore*, 583 So. 2d 1320 (Ala. 1991) (holding defendant's proffered reasons for striking black veniremembers failed because he treated white veniremembers disparately).